

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Periodic Reporting
(Proposal Two)

Docket No. RM2016-10

ORDER REGARDING THE POSTAL SERVICE'S MOTION FOR
CLARIFICATION OF ORDER NO. 3560

(Issued October 28, 2016)

On October 11, 2016, the Commission issued an order conditionally granting United Parcel Service, Inc.'s (UPS) motion for access to certain non-public materials.¹ Given the concerns of the Postal Service and the third-party Canada Post Corporation (Canada Post) regarding commercially sensitive data, UPS's access was conditioned upon the execution of an agreement regarding additional legal protections and indemnification in the event of an inadvertent disclosure. Since Order No. 3560 was issued, UPS and the Postal Service have provided two status reports indicating that

¹ Order Granting Motion for Access to Non-Public Materials Filed Under Seal, October 11, 2016 (Order No. 3560).

they are in continued negotiations.²

It appears that negotiations have stalled and the Postal Service now seeks clarification of Order No. 3560.³ The Postal Service explains that in its view, the agreement should provide for UPS to indemnify the Postal Service, Canada Post, and any other potentially impacted third parties. Motion at 3. It explains that the Postal Service should not be solely placed in the position of protecting Canada Post for UPS's disclosure of Canada Post's data. *Id.* In a letter attached to the Motion, Canada Post agrees with the Postal Service's position. See Motion, Attachment. However, the Postal Service states that UPS has thus far declined to agree to indemnify Canada Post or any other third party. Motion at 3. Therefore, the Postal Service requests that Order No. 3560 be amended to direct the Postal Service and UPS to enter into an agreement that: (1) specifically acknowledges Canada Post as a third party beneficiary of the agreement, and (2) stipulates that UPS will indemnify the Postal Service, Canada Post, and any other impacted third party, for any unauthorized disclosure (whether inadvertent or intentional) of the non-public information. *Id.* In support of the Motion, the Postal Service submitted a draft agreement, which included a signature line for Canada Post and several edits made by UPS but did not include edits to certain articles regarding third party indemnification. *Id.* at 3-4. The Postal Service asserts that it is prepared to sign the draft agreement, if the agreement is adopted by the Commission. *Id.* at 4.

In response, UPS requests that the Commission deny the Motion and order the Postal Service to execute the non-disclosure agreement filed with their response.⁴ UPS

² See Joint Status Report of United Parcel Service, Inc. and the United States Postal Service Regarding United Parcel Service's Motion for Access, October 18, 2016; Joint Status Report of the United States Postal Service and United Parcel Service Regarding United Parcel Service's Motion for Access, October 21, 2016.

³ United States Postal Service's Motion for Clarification of Postal Regulatory Commission's Order Granting Access to Non-Public Materials Filed Under Seal, October 24, 2016 (Motion).

⁴ United Parcel Service, Inc.'s Response to the United States Postal Service's Motion for Clarification of Postal Regulatory Commission's Order Granting Access to Non-Public Materials Filed Under Seal, October 25, 2016 (Response).

explains that the Commission's Order "is clear and unambiguous and requires no clarification." Response at 1. UPS states that the Commission directed it to agree to indemnify the Postal Service, and only the Postal Service. *Id.* at 2. UPS asserts that there is no legitimate risk of claims being brought against Canada Post and that Canada Post could bring legal claims directly against UPS should there be a misuse of data. *Id.* at 2-3. Further, UPS states that the Commission has an established procedure for access to non-public materials and the Postal Service should not be allowed to impose unreasonable barriers to access by interested parties. *Id.* at 4. In UPS's view, the Postal Service should either disclose sufficient information to allow interested parties to make meaningful comments or choose not to rely on non-public information so sensitive that no reasonable assurance would safeguard the interests at stake. *Id.*

Upon review of the Motion and Response, the Commission finds that the draft agreement as submitted by the Postal Service is consistent with Order No. 3560. In granting conditional access, the Commission balanced UPS's need for access to fully participate in this proceeding with the concerns of the Postal Service and third-party Canada Post. Order No. 3560 at 4. The Commission explained that "an agreement between UPS and the Postal Service regarding additional legal protections and indemnification in the event of an inadvertent disclosure will mitigate the concerns over adequate safeguards to protect the information." *Id.* The draft agreement appears to provide additional legal protections in the event of a disclosure and appears to mitigate the concerns of the Postal Service and Canada Post.

However, the Commission did not specify what particular terms must be in the agreement nor did it require Canada Post to be a signatory to the agreement in Order No. 3560. The Commission declines to do so now. The parties, not the Commission, are to negotiate the terms of the agreement. Nonetheless, in the absence of an agreement and in the interest of moving this proceeding forward, the Commission must take appropriate action. See Order No. 3560 at 4-5. Accordingly, UPS may agree to the terms of the draft agreement provided by the Postal Service with its Motion. In the alternative, UPS may request, and upon that request the Commission shall require, that

the Postal Service modify the underlying library reference to aggregate and mask mailer-specific data within five business days of the request. The revised library reference, and not the originally submitted data, would be analyzed by the Commission in this proceeding. Moreover, should the revised library reference be filed under seal, access will be determined by the standard protective conditions under 39 C.F.R. § 3007. Finally, the parties are all reminded of the Commission's standing sanctions for violating protective conditions associated with submitted protected materials. See 39 C.F.R. § 3007.62. UPS shall notify the Commission of how it wishes to proceed by November 1, 2016.

It is ordered:

1. The Postal Service's Motion for Clarification, filed October 24, 2016, is partially granted.
2. By November 1, 2016, UPS shall notify the Commission whether it will agree to the terms of the draft agreement filed with the Motion or if it will request that the Postal Service modify the underlying library reference to aggregate and mask mailer specific data.
3. Should UPS choose to request that the Postal Service modify the underlying library reference, the Postal Service shall file the revised library reference within five business days of the request.

By the Commission.

Stacy L. Ruble
Secretary